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COMMENT

A HOUSE BUILT ON SAND: THE QUALIFIED IMMUNITY CASE FOR KEEPING THE *SMITH* DOCTRINE

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I. INTRODUCTION

The Bill of Rights begins with multiple clauses protecting the religious liberty of all Americans.[1] Religious liberty's front and center position reflects its importance to the Founders. Today, religious liberty remains a topic of debate among legal scholars and ordinary citizens alike, regardless of their religious affiliations or lack thereof. Yet many constitutional scholars agree with the following: if freedom is a house, religious freedom is the foundation.[2] While this foundation has held up for over 250 years,[3] it has been eroded by uncertainty. And nobody can settle how to properly maintain or repair it, or, if the foundation is untenable, whether to destroy it and build a new one.

By consistently tinkering with the foundation, it will weather and crumble amid a looming tyranny tempest arising from the qualified immunity doctrine. This problem invites the following question: if the free exercise doctrine—being a key ingredient in the metaphorical foundation—is continually tampered with, broken, or scrapped, how can it protect religious liberty, if not all liberty, when lawless government actors are shielded by qualified immunity?

Religious freedom was subjected to a timely building inspection when the Supreme Court unanimously decided *Fulton v. City of Philadelphia*,[4] which received stark criticism for its reluctance to overturn *Employment Division v. Smith*[5] from notable religious freedom proponents, including members of the Court.[6] This Comment argues that, when it comes to defeating qualified immunity defenses, an imperfect free exercise doctrine is preferable to none at all. After all, the qualified immunity doctrine is a bigger threat to American liberty, as it threatens everyone, not just the religious. By seeking to tear down and rebuild the free exercise doctrine, religious liberty

1. U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

2. *See, e.g.*, John J. Infranca, *(Communal) Life, (Religious) Liberty, and Property*, 2017 MICH. ST. L. REV. 481, 501 ("[R]eligious freedom provides the foundation for a civil society independent from the state.").

3. The Bill of Rights, including the First Amendment, was ratified in 1791. Town of Greece v. Galloway, 572 U.S. 565, 606 (2014) (Thomas, J., concurring in part and concurring in the judgment).

4. Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).

5. Emp. Div. v. Smith, 494 U.S. 872 (1990).

6. *See Fulton*, 141 S. Ct. at 1926 (Alito, J., concurring in the judgment) (stating he would "overrule *Smith*"); *id.* at 1931 (Gorsuch, J., concurring in the judgment) ("*Smith* committed a constitutional error.").

proponents are, to tweak a famous Voltaire quote, letting "best [be] the enemy of the [okay]."[7]

Parts II and III of this Comment establish the history of the free exercise and qualified immunity doctrines, respectively. Part IV addresses the collision of free exercise and qualified immunity, summarizing how federal courts have handled these cases thus far. Parts V and VI discuss the problems and solutions of each doctrine. Finally, Part VII engages in a cost-benefit analysis, concluding that, until qualified immunity jurisprudence improves, the *Smith* doctrine gives free exercise claims the best chance of success.

II. LAYING THE FOUNDATION OF FREE EXERCISE JURISPRUDENCE

Neither Congress, state, nor municipality can enact a law "respecting an establishment of religion, or prohibiting the free exercise thereof."[8] What makes this constitutional text so fascinating is that the Establishment and Free Exercise Clauses appear at odds with each other at first glance.[9] The Court has reconciled this problem by interpreting the text to leave some wiggle room, or "play in the joints," for governments to pass laws that neither establish nor interfere with religion.[10] Stated differently, laws can be "permitted by the Establishment Clause but not required by the Free Exercise Clause."[11] This Comment does not focus on the Establishment Clause as much as its counterpart, but it is still worth considering because it often serves as the justification for legislation that does not promote religious activity.[12] The boundaries of the Establishment Clause have been

7. THE YALE BOOK OF QUOTATIONS 791 (Fred R. Shapiro ed., 2006). Voltaire was not the only one with this idea. Confucius is widely credited with stating, "Better a diamond with a flaw than a pebble without." *E.g.*, *Confucius Quotes*, BRAINYQUOTE, https://www.brainyquote.com/quotes/confucius_107048 [https://perma.cc/63S8-T5MY]. Similarly, William Shakespeare wrote in King Lear, "Striving to be better, oft we mar what's well." WILLIAM SHAKESPEARE, KING LEAR act 1, sc. 4., l. 341.

8. U.S. CONST. amend. I; *see* Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940) (holding the liberties protected by the Fourteenth Amendment include the First Amendment's Free Exercise Clause, meaning states and municipalities are bound by it).

9. *See* Walz v. Tax Comm'n, 397 U.S. 664, 668–69 (1970) (acknowledging the Religion Clauses "are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other"). *But see* Carl H. Esbeck, *Religion and the First Amendment: Some Causes of the Recent Confusion*, 42 WM. & MARY L. REV. 883, 918 (2001) ("[T]he Religion Clauses not only have their own scope, but operate independently of each other . . . .").

10. *Walz*, 397 U.S. at 669.

11. Locke v. Davey, 540 U.S. 712, 719 (2004).

12. *See id.* at 722–23 (discussing the history of states' interest in anti-establishment).

drawn in several distinct ways.[13] In what should come as no surprise, the Free Exercise Clause has received the same treatment, and, like other constitutional rights, it is not absolute.[14]

A. *The Development of the* Sherbert *Test*

Although the Court has performed most of its tinkering with the Free Exercise Clause over the last sixty years, *Reynolds v. United States*[15] marked the first time the Court embarked on this endeavor in a meaningful manner.[16] There, the Court addressed the issue of whether practicing religion—in this case, Mormonism—justified violating a federal criminal statute prohibiting bigamy.[17] At that time, Mormon orthodoxy declared "that it was the duty of male members of said church, circumstances permitting, to practi[c]e polygamy" and that breaching this duty would amount to "damnation."[18]

13. *See* Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) ("[T]he clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'" (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878))); Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) ("First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"(citation omitted) (quoting *Walz*, 397 U.S. at 674) (citing Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968))); Marsh v. Chambers, 463 U.S. 783, 792 (1983) (concluding a religious practice by government officials does not constitute establishment if the act is a part of "unambiguous and unbroken history" and "has become part of the fabric of our society"); Van Orden v. Perry, 545 U.S. 677, 690 (2005) (determining a public monument that carries both a religious and historical significance does not violate the Establishment Clause). For a fascinating look at a novel interpretation of the Establishment Clause, see Eimi Priddis Yildirim, *A Rhetorical Revolution: The Antithesis of the First Amendment*, 33 BYU J. PUB. L. 287, 318–19 (2019) (asserting "respecting" should be interpreted as a verb, which narrows the meaning of the Establishment Clause).

14. *See* Cantwell v. Connecticut, 310 U.S. 296, 310 (suggesting there are limits to religious freedom); Cohen v. California, 403 U.S. 15, 19 (1971) ("[T]he First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases or to use any form of address in any circumstances that he chooses."); District of Columbia v. Heller, 554 U.S. 570, 626 (2008) ("Like most rights, the right secured by the Second Amendment is not unlimited."); Kovacs v. Cooper, 336 U.S. 77, 85 (1949) ("Of course, even the fundamental rights of the Bill of Rights are not absolute.").

15. Reynolds v. United States, 98 U.S. 145 (1878).

16. *See id.* at 163 (concluding the last controversy involving the Establishment Clause occurred in 1784); Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1387 (1967) (contending *Reynolds* was "[t]he first important religious liberty case . . . decided by the Supreme Court").

17. *Reynolds*, 98 U.S. at 162.

18. *Id.* at 161. By 1904, the Mormon church prohibited polygamy and, by 1909, took "action against the membership of those who continued to enter new plural unions." *Mormon Polygamy Timeline*, JOSEPH SMITH'S POLYGAMY, https://josephsmithspolygamy.org/history/mormonpolygamyhistory/ [https://perma.cc/3A8U-3M2W].

Acknowledging this, the Court weighed the conflicting views of key Founders. On one hand, James Madison "demonstrated 'that religion, or the duty we owe the Creator,' was not within the cognizance of civil government."[19] On the other, Thomas Jefferson "declared 'that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.'"[20] The Court then concluded on a historical basis that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[21] Therefore, when it examined the federal statute prohibiting bigamy in the Utah territories, along with the history of such laws in the colonies and England, the Court held the criminal statute was enacted to conserve social values and good order and was thus constitutional.[22] In doing so, it made a key statement that laid the groundwork for future free exercise precedent:

> So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become

19. *Reynolds*, 98 U.S. at 163.

20. *Id.* The Court also referred to a Jefferson quote about the proposed First Amendment, which stated:

> Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions,—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion or prohibiting the free exercise thereof," thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.

Id. at 164 (internal quotation marks omitted). This quote has also been referred to as evidence that "strict neutrality" was most likely the Framers' original understanding of the Free Exercise Clause. Giannella, *supra* note 16, at 1387.

21. *Reynolds*, 98 U.S. at 164.

22. *Id.* at 165–66.

> a law unto himself. Government could exist only in name under such circumstances.[23]

Accordingly, the Court acknowledged that religious freedom must give way to the public interest.[24]

Often situations arise where freedom of religion and freedom of speech converge. For example, a Jehovah's Witness was charged with religious solicitation without prior authorization, in violation of a criminal statute, and "inciting a breach of the peace," a common law offense.[25] Cantwell had been canvasing the public streets, distributing literature, and soliciting contributions when he approached two men, asking for permission to play a record from a phonograph.[26] The two men granted permission, and Cantwell played the record containing audio vehemently attacking the Catholic faith.[27] The men, being Catholics, were seriously offended, and an altercation would have been imminent had Cantwell stayed in the area.[28] The Court held first that the solicitation prohibition was unconstitutional on its face and as applied to the case because it amounted to a ban on religious speech in the public square—clearly violative of the First Amendment.[29] According to the Court, the state legislature could have regulated this kind of religious solicitation via content-neutral time, place, and manner regulations that would merely regulate how speech was conducted.[30]

Further, the Court indicated that if the statute is a "general regulation" that "does not involve any religious test and does not unreasonably obstruct

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23. *Id.* at 166–67.

24. As time passed, these public interests included public health and safety, protecting children, and morality. *See* Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905) (holding compulsory small pox vaccinations of otherwise healthy individuals were among the "manifold restraints to which every person is necessarily subject for the common good"); Prince v. Massachusetts, 321 U.S. 158, 170 (1944) (giving greater weight to a state's interest in restricting child labor than a Jehovah's Witness's interest in teaching her children to evangelize and distribute literature to pedestrians); Cleveland v. United States, 329 U.S. 14, 16, 20 (1946) (quoting *Reynolds*, 98 U.S. at 164) (agreeing polygamy is odious and may be prohibited on that ground).

25. Cantwell v. Connecticut, 310 U.S. 296, 300 (1940).

26. *Id.* at 302–03.

27. *Id.*

28. *Id.* at 303.

29. *See id.* at 304 ("No one would contest the proposition that a state may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guarantee." (citing Near v. Minnesota *ex rel.* Olsen, 283 U.S. 697, 713 (1931))).

30. *Id.*

or delay the collection of funds, [it] is not open to any constitutional objection, even though the collection be for a religious purpose."[31] This affirmed the idea that, although religious belief is untouchable, religious conduct is not.[32] Secondly, the Court found that Cantwell's speech did not constitute a breach of the peace, a theory typically adopted in freedom of speech cases, because it presented no "clear and present danger"; thus, his religious speech was constitutionally protected.[33]

Although free exercise cases up to this point had been analyzed simply by weighing the governmental interest against the individual's liberty interest (or by adopting another doctrine when other rights were implicated), the Sunday closing laws in the 1960s muddied the free exercise doctrine. In one instance, an Orthodox Jew sought a permanent injunction against a state criminal statute that prohibited retail businesses from operating on Sundays.[34] Braunfeld alleged the statute forced his business to close three days a week—he observed Sabbath from Friday night to Saturday night—while his Gentile competitors only closed one day a week.[35] Thus, the statute caused him economic loss because of his religious practice.[36] In essence, Braunfeld was forced to "choose between his religious faith and his economic survival."[37] The Court, referring to the "nearly limitless" amount of tax laws that limit deductions for religious contributions, laid down a rule that permits state legislatures to "impose[] only an indirect burden on the exercise of religion" because to invalidate such legislation "would radically restrict the operating latitude of the legislature."[38] Nevertheless, if these laws "discriminate invidiously between religions," or if they can accomplish the government's secular interests in a less burdensome manner, they are unconstitutional.[39]

31. *Id.* at 305. The *Cantwell* Court's statement about a general regulation could be a precursor to the "general applicability" prong of the *Smith* test. *Cf.* Emp. Div. v. Smith, 494 U.S. 879 (1990) (holding free exercise rights do not trump a "valid and neutral law of general applicability" (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)) (internal quotation mark omitted)).

32. *See Cantwell*, 310 U.S. at 310 (contending "opinion and belief" must "develop unmolested and unobstructed" while "coercive activities" may be limited).

33. *Id.* at 311.

34. Braunfeld v. Brown, 366 U.S. 599, 600–01 (1961).

35. *Id.* at 601–02.

36. *Id.*

37. *Id.* at 616 (Stewart, J., dissenting).

38. *Id.* at 606 (majority opinion).

39. *Id.* at 607 (citing Cantwell v. Connecticut, 310 U.S. 296, 304–05 (1940)).

Merely two years later, in *Sherbert v. Verner*,[40] the Court went significantly further, arguably overruling *Braunfeld*.[41] This case involved another person who incurred economic loss from observing the Sabbath on Saturday. But this time, the plaintiff was a Seventh-day Adventist. She was terminated from her job after she refused to work on Saturdays.[42] When she applied for unemployment benefits, she was denied because she "fail[ed], without good cause, to accept 'suitable work when offered . . . by the employment office or the employer.'"[43] The Court then assessed the burden the statute imposed on Sherbert's religion and whether the state interest was "compelling," not merely legitimate.[44] The Court found the burden, while indirect, to be tantamount to imposing a fine on her religious beliefs, necessarily amounting to invidious discrimination.[45] Next, the Court distinguished this case from *Braunfeld*, claiming the governmental interest in "providing one uniform day of rest" was "strong," while limiting unemployment benefits to people who "accept suitable work when offered" was not.[46] Therefore, it was unconstitutional to withhold unemployment benefits from those who refused to work on *their* Sabbath.[47]

The Court adopted this same line of reasoning in *Wisconsin v. Yoder*.[48] There, Amish parents, who wished to homeschool their children, challenged a compulsory school-attendance law mandating all children attend school until sixteen years old.[49] The parents sincerely believed that exposing their children to the secular, modernized world would "endanger their own salvation" and threaten their Amish values.[50] The parents only sought to take over responsibility for their children's education after they completed

40. Sherbert v. Verner, 374 U.S. 398 (1963).

41. *See id.* at 421 (Harlan, J., dissenting) (arguing the majority's decision "necessarily overrule[d]" *Braunfeld*").

42. *Id.* at 399 (majority opinion).

43. *Id.* at 401 (omission in original).

44. *See id.* at 403, 406 ("We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right.").

45. *Id.* at 404, 406.

46. *Id.* at 401, 408–09.

47. *See id.* at 410 ("Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest.").

48. Wisconsin v. Yoder, 406 U.S. 205 (1972).

49. *Id.* at 207.

50. *Id.* at 209.

the eighth grade.[51] On the other hand, Wisconsin's interest was to provide "universal education," which was well within the scope of its police powers.[52] While the compulsory rule was generally applicable and did not target the Amish specifically, the Court determined that it nevertheless greatly interfered with the Amish's free exercise rights and exacerbated the burden by not containing a religious exception.[53]

The Court then examined whether the state's interest was compelling, concluding that mandating "an additional one or two years of formal high school for Amish children in place of [the Amish's] long-established program of informal vocational education" was not compelling.[54] Moreover, the statute burdened the parents' religious rights and their right "to direct the upbringing and education of [their] children."[55] Addressing this point, the Court stated that, if a law infringes on both of these rights, the government must show that it bears "more than merely a 'reasonable relation to some purpose within the competency of the State'" to conform with the First Amendment.[56] For these reasons, the Court held the compulsory school attendance law unconstitutional.[57]

The free-exercise doctrine at the time of *Sherbert* may be summarized as follows: (1) laws that substantially burden religious freedom or discriminate based on religious practices are per se unconstitutional; and (2) laws that are neutral and generally applicable yet indirectly burden religious freedom are unconstitutional unless they further a compelling interest through the least burdensome means.[58] Yet, this rule was re-examined almost twenty years later.

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51. *See id.* at 211 ("Formal high school education beyond the eighth grade is contrary to Amish beliefs . . . .").

52. *Id.* at 213–14 (citing Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925)).

53. *Id.* at 219–20.

54. *Id.* at 222.

55. *Id.* at 232–33 (citing Meyer v. Nebraska, 262 U.S. 390 (1923)).

56. *Id.* at 233 (quoting *Pierce*, 268 U.S. at 535). The Court's statement here may imply that laws burdening parental rights *alone* would face a lower level of scrutiny than those burdening parental *and* free exercise rights. *See* Mark Strasser, Yoder*'s Legacy*, 47 HOFSTRA L. REV. 1335, 1348 (2019) ("Such a comment suggests that when free exercise interests are not also at issue, then the interests of parenthood are *permissibly* overridden as long as there is a reasonable relationship between the state regulation and a legitimate purpose.").

57. *Yoder*, 406 U.S. at 234.

58. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1890 (2021) (Alito, J., concurring in the judgment) ("The test distilled from *Sherbert*—that a law that imposes a substantial burden on the exercise of religion must be narrowly tailored to serve a compelling interest—was the governing rule . . . .").

B. *The* Smith *Doctrine and the Legislative Response*

In *Employment Division v. Smith*, Alfred Smith and Galen Black, both Oregon residents, were terminated from their positions at a private drug rehabilitation facility for taking peyote[59] "for sacramental purposes at a ceremony of the Native American Church."[60] Meanwhile, Oregon law made it illegal to possess peyote unless it was prescribed for medicinal purposes.[61] When Smith and Black filed for unemployment benefits, the Employment Division denied them because they were terminated for work-related "misconduct."[62] The Oregon Court of Appeals reversed Employment Division's denial, claiming it violated the Free Exercise Clause.[63] The first time this case reached the Supreme Court, it agreed that Oregon's criminal prohibition was relevant in determining whether the denial of benefits was constitutional.[64] The second time it reached the Court, however, garnered the most controversy.

In its second look, the Court claimed it had never previously "held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate"; neither had it determined that "the right of free exercise . . . relieve[d] an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[65] Although *Cantwell* and *Yoder* suggested otherwise, the Court distinguished them because they addressed other constitutional rights in conjunction with the Free Exercise Clause—a "hybrid situation."[66] Moreover, the Court characterized *Sherbert*'s

59. Peyote (scientifically known as *Lophophora williamsii*) is a cactus plant found in southern Texas and northern Mexico, which produces hallucinogenic effects in humans when ingested. *Peyote*, ENCYC. BRITANNICA, https://www.britannica.com/plant/Lophophora-william [https://perma.cc/VVA7-23Q3].

60. Emp. Div. v. Smith, 494 U.S. 872, 874 (1990). The Native American Church, also called Peyotism, is the "most widespread indigenous religious movement among North American Indians," and its members believe the ritual consumption of peyote enables them to commune with God. *Native American Church*, ENCYC. BRITANNICA, https://www.britannica.com/topic/Native-American-Church [https://perma.cc/WF3F-DX6R].

61. *Smith*, 494 U.S. at 874.

62. *Id.*

63. *Id.*

64. *Id.* at 875.

65. *Id.* at 878–79 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)) (citing Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 595 (1940)).

66. *Id.* at 881–82 (first citing Cantwell v. Connecticut, 310 U.S. 296, 304–07 (1940); and then citing Wisconsin v. Yoder, 406 U.S. 205 (1972)).

compelling interest requirement as "courting anarchy" because it would make laws "presumptively invalid" and give way to the subjective beliefs of individuals, which was not what the Founders intended.[67] Although similar tests are used in other fields, requiring a compelling interest in the free exercise context would be "constitutional[ly] anomal[ous]" and lead to unintended and impracticable results.[68] Finally, the Court held that, while the *Sherbert* test does not mandate religious exemptions, laws with exemptions must also accommodate religions.[69]

In short, the *Smith* doctrine limits the compelling interest requirement, or *Sherbert* test, to three kinds of cases: (1) "employment compensation cases"; (2) "'hybrid' rights cases"; and (3) laws that are not neutral and generally applicable.[70] But in cases where the law *is* neutral and generally applicable, the government need not prove that the law furthers a compelling interest in the least restrictive means.[71] This rule, having received much criticism, was put to the test three years later.

The Church of the Lukumi Babalu Aye (Church) was a religious organization practicing Santeria.[72] One of its key religious practices was animal sacrifice.[73] Shortly after establishing itself in Hialeah, Florida, city officials enacted an ordinance prohibiting the unnecessary killing and mutilation of animals "in a public or private ritual or ceremony."[74] Notably,

67. *Id.* at 888 (emphasis omitted).

68. *Cf. id.* at 885–86 ("To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, 'to become a law unto himself[]'—contradicts both constitutional tradition and common sense." (citation omitted) (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)) (internal quotation marks omitted)).

69. *See id.* at 884 ("[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986))).

70. MICHAEL S. ARIENS, AMERICAN CONSTITUTIONAL LAW AND HISTORY 890–91 (2d ed. 2016).

71. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1876 (2021) (describing how, under *Smith*, laws that "incidentally burden[]" religion are ordinarily not subject to strict scrutiny if they are "neutral and generally applicable").

72. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 525 (1993). Santeria is a growing tradition, originating in Africa and later migrating to Cuba through the slave trade in which practitioners ritually make animal sacrifices to "*orisha* deities." Joseph M. Murphy, *Santeria*, ENCYC. BRITANNICA, https://www.britannica.com/topic/Santeria [https://perma.cc/ZCJ9-LFWZ].

73. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 524, 526.

74. *Id.* at 527.

the ordinance followed "[a] pattern of exemptions" and "narrow prohibitions," strongly indicating Hialeah was targeting the Church.[75]

The Church filed suit, claiming the ordinance violated the Free Exercise Clause.[76] Applying *Smith*, the Court examined whether the ordinance was neutral and generally applicable.[77] The key to this two-pronged analysis is that if one prong fails, the other will likely fail as well; in other words, general applicability and neutrality are closely linked.[78] Because the ordinance focused entirely on animal sacrifice—exempting both kosher and commercial slaughtering of animals—the Court found it was an example of "religious gerrymander[ing]," as it only affected the Church.[79] After all, if the goal was to prevent the inhumane treatment of animals, why only prohibit ritualistic animal sacrifice?[80]

The Court also noted the statements and comments made by members of the city council, which demonstrated hostility toward the Church. For example, during discussions, the city council president inquired, "What can we do to prevent the Church from opening?"[81] Accordingly, the neutrality requirement was clearly not met.[82] The Court also concluded that the ordinance was not generally applicable in that it was underinclusive by excluding inhumane slaughterhouses and the unsanitary disposal of animal carcasses, which could be detrimental to public health.[83] Therefore, because the ordinance was not neutral or generally applicable, the Court applied strict scrutiny.[84] Regardless of whether the City's interests were compelling, the ordinance was not narrowly tailored to those interests.[85]

Despite *Smith*'s application favoring religious liberty, Congress expressed its disdain. In the same year as *Church of Lukumi Babalu Aye*, Congress—

75. *Id.* at 537.

76. *Id.* at 528–29.

77. *Id.* at 531–32.

78. Both prongs of *Smith* are so closely linked that a failure of either is likely a failure of both. *See id.* at 531 ("Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied.").

79. *Id.* at 535 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970) (Brennan, J., concurring)).

80. *Id.* at 536–37.

81. *Id.* at 541 (internal quotation marks omitted).

82. *Id.* at 542.

83. *Id.* at 544–45.

84. *See id.* at 546 (subjecting the ordinance to "the most rigorous of scrutiny").

85. *Id.*

nearly unanimously[86]—enacted the Religious Freedom Restoration Act of 1993 (RFRA)[87] under the Enforcement Clause of the Fourteenth Amendment.[88] The RFRA codified *Sherbert* by making any law that substantially burdens religious exercise unlawful—even if it was neutral and generally applicable—unless it could survive strict scrutiny.[89] Furthermore, a person whose religious freedom was burdened could recover against the government.[90]

However, the RFRA's constitutionality was challenged, and the Court struck down the law as it applied to the states.[91] According to the Court, Congress exceeded its authority under the Enforcement Clause by undermining its interpretation of the Constitution rather than enforcing it, thereby infringing on principles of federalism and separation of powers.[92]

Suffering a great defeat, Congress regrouped years later and passed the narrower Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).[93] The RLUIPA again codified the *Sherbert* test but limited its application to substantial burdens on religious liberty that: (1) are imposed in a program that receives federal government aid; (2) affect interstate commerce; or (3) are imposed when the government makes individualized assessments of proposed uses for properties when enforcing land use

86. The House passed its version of the bill unanimously, and the Senate passed its version 97–3. *H.R. 1308 (103rd): Religious Freedom Restoration Act of 1993*, GOVTRACK (Oct. 27, 1993, 10:25 AM), https://www.govtrack.us/congress/votes/103-1993/s331 [https://perma.cc/299V-XPSU]. Congressman Chuck Schumer (D-NY) and Senator Ted Kennedy (D-MA) introduced the respective versions of the bill. *Id.*

87. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb–2000bb-4).

88. The Fourteenth Amendment's Enforcement Clause provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

89. 42 U.S.C. § 2000bb-1(a)–(b).

90. *Id.* § 2000bb-1(c).

91. City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

92. *See id.* at 532 ("[The RFRA] appears . . . to attempt a substantive change in constitutional protections.").

93. Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified as amended at 42 U.S.C. §§ 2000cc–2000cc-5). The Bill was passed unanimously in the House and Senate and was signed into law by President Clinton. *S. 2869 (106th): Religious Land Use and Institutionalized Persons Act of 2000*, GOVTRACK (Oct. 11, 2018), https://www.govtrack.us/congress/bills/106/s2869/summary#oursummary [https://perma.cc/PZU5-37CB].

regulations.[94] The RLUIPA, along with the *Smith* doctrine, remains good law.[95]

III. THE BREWING QUALIFIED IMMUNITY STORM

While the foundation of the free exercise doctrine was laid, another legal concept gained traction: the qualified immunity defense against a claim brought under 42 U.S.C. § 1983. This statute, originally the Civil Rights Act of 1871, states:

> Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."[96]

This Act was also originally known as the Ku Klux Klan Act because its purpose was to provide remedies for recently freed slaves whose

94. 42 U.S.C. §§ 2000cc(a)(2), 2000cc-1(b).

95. *See* Mease v. Washington, No. 20-cv-176, 2021 WL 1921071, at *14 n.6 (W.D. Mich. May 13, 2021) ("Every circuit to consider the constitutionality of [the] RLUIPA has concluded that the statute . . . is constitutional under Congress'[s] authority under the Spending Clause." (first citing Smith v. Allen, 502 F.3d 1255, 1274 n.9 (11th Cir. 2007); then citing Madison v. Virginia, 474 F.3d 118, 124 (4th Cir. 2006); then citing Cutter v. Wilkinson, 423 F.3d 579, 584–90 (6th Cir. 2005); then citing Benning v. Georgia, 391 F.3d 1299, 1313 (11th Cir. 2004); then citing Charles v. Verhagen, 348 F.3d 601, 606–11 (7th Cir. 2003); then citing Mayweathers v. Newland, 314 F.3d 1062, 1066–70 (9th Cir. 2002); and then citing Cutter v. Wilkinson, 544 U.S. 709, 715 (2005))); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1876–77 (2021) (refusing to overrule *Smith*). Since the passage of the RLUIPA, President Trump enacted an executive order seeking to "vigorously enforce [f]ederal law's robust protections for religious freedom" and ensure "that the Department of Treasury does not take any adverse action against any individual, house of worship, or other religious organization" based on their religious and political speech. Exec. Order No. 13,798, 82 Fed. Reg. 21,675 (May 4, 2017). This Executive Order has been criticized for being an "effort[] to gaslight the American public in order to elevate the rights of larger religious organizations." Robin Knauer Maril, *The Religious Freedom Restoration Act,* Trinity Lutheran*, and Trumpism: Codifying Fiction with Administrative Gaslighting*, 16 NW. J.L. & SOC. POL'Y 1, 2 (2020).

96. 42 U.S.C. § 1983. This Act also provides an exception, limiting injunctive relief to "an action brought against a judicial officer for an act or omission taken in such officer's judicial capacity." *Id.*

constitutional rights were violated by state officials—including judges—with ties to the Klan.[97]

Nevertheless, in *Pierson v. Ray*,[98] the Court limited the reach of § 1983 by holding it did not render common law defenses obsolete.[99] These defenses included qualified immunity for police officers, which the Court defined as "the defense of good faith and probable cause."[100] In *Pierson*, the police arrested several Freedom Riders, one of whom was an Episcopal clergyman, for using a segregated waiting room at a bus terminal and breaching the peace.[101] The officers argued that they acted in good faith and had probable cause because they were worried about imminent violence erupting between the Freedom Riders and the public.[102] The Court sided with the officers, concluding that, if they reasonably believed they had probable cause and acted in good faith, they were immune from liability—even if their actions were unconstitutional.[103]

The good faith basis for qualified immunity extends beyond police officers. In *Wood v. Strickland*,[104] for example, a school board voted to expel students for spiking the punch bowl with alcohol at an after-school meeting.[105] The Court stated: "It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of *executive*

97. This Act was the third of a series of "Enforcement Acts" designed to protect the liberty of freed slaves and was signed into law by President Ulysses S. Grant on April 20, 1871. *The Ku Klux Klan Act of 1871*, U.S HOUSE OF REPS.: HIST., ART & ARCHIVES, https://history.house.gov/Historical-Highlights/1851-1900/hh_1871_04_20_KKK_Act/ [https://perma.cc/2R2R-PEY3]. Prior to the Act's passage, the Klan's terroristic activities increased after the election of the first African American Senator and Congressman, Hiram Rhodes Revels (R-MS) and Joseph Rainey (R-SC), respectively. *The Ku Klux Klan*, NAT'L GEO. (Jan. 27, 2020), https://www.nationalgeographic.org/article/ku-klux-klan/ [https://perma.cc/JZJ7-RHUP]. The KKK disbanded in the 1870s partly because of federal legislation, including the Act. *Id.*

98. Pierson v. Ray, 386 U.S. 547 (1967).

99. *Id.* at 554.

100. *Id.* at 557. The absolute immunity of judges, "even when the judge is accused of acting maliciously and corruptly," was also kept intact by the Court. *Id.* at 553–54.

101. *Id.* at 548–49, 553 n.8.

102. *Id.* at 557.

103. *Id.* The Court still remanded the case for another trial because the jury was influenced by "irrelevant and prejudicial evidence" that was introduced to prove that the Freedom Riders consented to being arrested or "goaded" the officers into arresting them. *Id.* at 557–58. The case was ultimately dismissed. Craig Basse, *Rev. Robert Pierson, Social Activist*, TAMPA BAY TIMES (Oct. 1, 2005), https://www.tampabay.com/archive/1997/04/30/rev-robert-pierson-social-activist/ [https://perma.cc/NKF6-V248].

104. Wood v. Strickland, 420 U.S. 308 (1975).

105. *Id.* at 311–13.

officers for acts performed in the course of *official conduct*."[106] Further, the Court held that the official must maliciously violate a "clearly established" constitutional right to warrant damages.[107]

The Court in *Harlow v. Fitzgerald*[108] entrenched the clearly established qualifier into its jurisprudence.[109] It also addressed the need to prevent burdening executive officials—in this case, presidential aides[110]—with myriad "insubstantial suits."[111] Because good faith is often a fact in dispute, precluding a grant of summary judgment, the Court replaced it with the clearly established standard.[112] This means government officials are shielded from liability if their "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[113] This standard would eventually extend to constitutional violations "across the board."[114]

In *Saucier v. Katz*,[115] the Court doubled down on *Harlow* by requiring courts to address two questions in qualified immunity inquiries: (1) whether

106. *Id.* at 318 (emphasis added) (quoting Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974)) (internal quotation mark omitted).

107. *See id.* at 322 ("A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.").

108. Harlow v. Fitzgerald, 457 U.S. 800 (1982).

109. *Id.* at 818–19.

110. Mr. Fitzgerald claimed that President Nixon and two White House aides, including Mr. Harlow, conspired to dismiss him from his contractor position in the Air Force after he blew the whistle on the government's overspending in the building of the C-5A aircraft. *Id.* at 802–05; Harrison Smith, *A. Ernest Fitzgerald, Pentagon Whistleblower Fired by Nixon, Dies at 92*, WASH. POST (Feb. 7, 2019), https://www.washingtonpost.com/local/obituaries/a-ernest-fitzgerald-pentagon-whistleblower-fired-by-nixon-dies-at-92/2019/02/07/2f3277f4-2afe-11e9-984d-9b8fba003e81_story.html [https://perma.cc/CN6R-2MJ8].

111. *Harlow*, 457 U.S. at 808.

112. The Court stated:

> The subjective element of the good-faith defense frequently has proved incompatible with our admonition in *Butz* that insubstantial claims should not proceed to trial. . . . And an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury.

Id. at 815–16.

113. *Id.* at 818 (first citing Procunier v. Navarette, 434 U.S. 555, 565 (1978); and then citing Wood v. Strickland, 420 U.S. 308, 322 (1975)).

114. Anderson v. Creighton, 483 U.S. 635, 642 (1987) (quoting *Harlow*, 457 U.S. at 821 (Blackmun, J., concurring)) (internal quotation marks omitted) (citing Malley v. Briggs, 475 U.S. 335, 340 (1986)).

115. Saucier v. Katz, 533 U.S. 194 (2001).

"the facts alleged show the officer's conduct violated a constitutional right"; and (2) if a violation exists, whether the right was clearly established.[116] To meet the clearly established standard, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[117] The Court also reinforced that qualified immunity is "an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial."[118] Shortly thereafter, in *Pearson v. Callahan*,[119] the Court left it for district courts to determine which of the two *Saucier* prongs to consider first, even though analyzing the prongs in the way *Saucier* did is "often beneficial."[120]

In later cases, the Court attempted to clarify the clearly established standard by explaining: (1) it requires enough precedent to place the reasonableness of the officer's conduct "beyond debate";[121] (2) it "should not be defined at a 'high level of generality'";[122] and (3) it requires that the "right's contours were sufficiently definite that any reasonable officer in the defendant's shoes would have understood that he was violating it."[123] In other words, in determining whether a law satisfies the clearly established standard, specificity is key.[124]

IV. COLLISIONS BETWEEN FREE EXERCISE AND QUALIFIED IMMUNITY

In the last few years, qualified immunity, a nearly unstoppable force, has met free exercise, a somewhat immovable object. Many of these cases arise

116. *Id.* at 201.

117. *Id.* at 202 (quoting *Anderson*, 483 U.S. at 640) (internal quotation mark omitted).

118. *Id.* at 200–01 (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)) (internal quotation marks omitted).

119. Pearson v. Callahan, 555 U.S. 223 (2009).

120. *See id.* at 236 (noting the clearly established discussion often answers whether a constitutional right was violated, essentially killing two birds with one stone, which saves judicial resources and develops case law more effectively).

121. Mullenix v. Luna, 577 U.S. 7, 19 (2015) (per curiam) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)) (internal quotation marks omitted).

122. White v. Pauly, 580 U.S. 73, 79 (2017) (per curiam) (quoting *al-Kidd*, 563 U.S. at 742). *But see* Hope v. Pelzer, 536 U.S. 730, 741 (2002) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances."); Taylor v. Riojas, 141 S. Ct. 52, 53–54 (2020) (per curiam) (recognizing general rules "may apply with obvious clarity to . . . specific conduct" (quoting *Hope*, 536 U.S. at 741)).

123. Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018) (per curiam) (quoting Plumhoff v. Rickard, 572 U.S. 765, 778–79 (2014)) (internal quotation mark omitted).

124. *See* City of Escondido v. Emmons, 139 S. Ct. 500, 503 (2019) (per curiam) ("Under our cases, the clearly established right must be defined with specificity.").

out of the correctional system.[125] Typically, these cases implicate both § 1983 and the RLUIPA, not just § 1983, as with most qualified immunity cases.[126] Hence, federal courts often grapple with both claims simultaneously whenever an inmate alleges a free exercise violation.[127] While the RLUIPA is sometimes understood as the stronger of the two claims,[128] it often succumbs to qualified immunity because of how courts have interpreted § 1983's damages provisions.[129] Usually, if the RLUIPA

125. *See, e.g.*, Ashaheed v. Currington, 7 F.4th 1236, 1249 (10th Cir. 2021) (holding the correctional officer's conduct violated the inmate's free exercise rights). It could be that these cases arise mostly from the prison system because institutionalized people are subject to harsher restrictions and have more physical contact with government actors than people who are not.

126. Prison guards for state and federal prisons are "under color of . . . statute." 42 U.S.C. § 1983; *see, e.g.*, N.C. GEN. STAT. § 148-5.5 (2022) ("Security guard and patrol professionals trained pursuant to this section shall have the authority to detain and use necessary force pursuant to State prison policies . . . ."). Prisons are also institutions that receive federal aid under the RLUIPA. 42 U.S.C. § 2000cc(a)(2); *see* Lauren-Brooke Eisen, *The Federal Funding that Fuels Mass Incarceration*, BRENNAN CTR. FOR JUST. (June 7, 2021), https://www.brennancenter.org/our-work/analysis-opinion/federal-funding-fuels-mass-incarceration [https://perma.cc/Z6XX-W4F3] (detailing the amount of federal spending going to state and local jails and prisons). These cases also implicate the Prison Litigation Reform Act, enacted to limit frivolous lawsuits filed by inmates. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended at 42 U.S.C. § 1997e). The Act conflicts with RLUIPA by restricting, rather than protecting, inmates' ability to recover for constitutional violations. Jennifer Larson, *RLUIPA, Distress, and Damages*,74 U. CHI. L. REV. 1443, 1452–53 (2007).

127. Although this Comment does not discuss this in detail, § 1983 and the RLUIPA must be considered together in situations involving land-use regulations burdening religious freedoms. For instance, consider the case involving a county that passed a regulation seeking to install modern septic systems in Amish communities without granting religious exemptions. Mast v. Fillmore County, 141 S. Ct. 2430, 2430–31 (2021) (Gorsuch, J., concurring). Here, the Court merely vacated the judgment and remanded to the court below for further consideration given the recent *Fulton* ruling. *Id.* at 2430 (majority opinion). However, Justice Gorsuch asserted in a concurrence that the regulation did not stand up to the strict scrutiny required by the RLUIPA. *Id.* at 2433–34 (Gorsuch, J., concurring).

128. *See, e.g.*, Hudson v. Spencer, No. 15-2323, 2018 WL 2046094, at *3 (1st Cir. Jan. 23, 2018) ("[T]he First Amendment affords less protection to inmates' free exercise rights than does [the] RLUIPA." (alteration in original) (quoting Lovelace v. Lee, 472 F.3d 174, 199–200 (4th Cir. 2006)) (internal quotation marks omitted) (citing Kuperman v. Wrenn, 645 F.3d 69, 79 (1st Cir. 2011))).

129. *See* Newsome v. Streeter, No. 18-3927, 2019 WL 4842955, at *1, *4 (6th Cir. July 3, 2019) (affirming the district court's dismissal of the inmate's RLUIPA claim on the ground that the inmate must seek injunctive relief); Riley v. Ewing, 777 F. App'x 159, 161 (7th Cir. 2019) ("[T]he statutory claim failed because the [RLUIPA] does not authorize claims for damages."); Freeman v. Sample, 814 F. App'x 455, 458 (11th Cir. 2020) ("Freeman's RLUIPA claims failed because monetary damages are not available against the defendants under [the] RLUIPA . . . ."). *But see* Thomas v. Baca, 827 F. App'x 777, 778 (9th Cir. 2020) (affirming the district court's denial of the prison officials' motion for summary judgment). RLUIPA claims have failed against qualified immunity even without the damages issue being addressed. Larson, *supra* note 126, at 1465–66. The RLUIPA claimant must also jump

claim fails, so does the § 1983 claim.[130] Stand-alone § 1983 claims are particularly vulnerable to dismissal because of how narrowly the clearly established standard is applied.[131] But this is not always the case.

The Tenth Circuit, for example, reversed a district court's grant of summary judgment because the parole officer should have reasonably known that conditioning an atheist inmate's parole on religious participation violated clearly established free exercise law.[132] To reach this conclusion, the court considered its own precedent and the neutrality requirement of *Smith*.[133] In a subsequent case, it held: "A general rule can serve as clearly established law when it states 'the contours of [a] constitutional transgression' in a 'well[-]defined' or 'well-marked' manner without leaving a 'vaguely-defined legal border.'"[134] This is a departure from the typical, ultra-narrow interpretation.[135]

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another hurdle by proving that the prison regulation is not "reasonably related to legitimate penological interests." Turner v. Safley, 482 U.S. 78, 89 (1987); *see also* Beard v. Banks, 548 U.S. 521, 528–29 (2006) (quoting *Turner*, 482 U.S. at 87) (reaffirming *Turner*'s reasonableness standard).

130. *See Newsome*, 2019 WL 4842955, at *2, *4 (affirming the district court's dismissal of the appellant's § 1983 claim because the appellant failed to show that the appellee violated his constitutional rights); *Riley*, 777 F. App'x at 161 ("[Precedent] does not clearly establish that Ewing violated Riley's free-exercise rights."); *Freeman*, 814 F. App'x at 462 (affirming the district court's dismissal of the § 1983 claim because it was "reasonable for [the defendants] to conclude that denying [the plaintiff's] requests for kosher meals did not violate his First Amendment free exercise rights").

131. *See* Gonzalez v. Morris, 824 F. App'x 72, 74 (2d Cir. 2020) (concluding the defendants were entitled to qualified immunity because the plaintiff failed to show that his free exercise right was clearly established); Terrell v. Ducart, 808 F. App'x 520, 521 (9th Cir. 2020) (affirming the district court's dismissal of the § 1983 claim on the basis of qualified immunity because "it would not have been clear to every reasonable prison official" that their actions were unlawful (first citing Pearson v. Callahan, 555 U.S. 223, 232 (2009); and then citing Foster v. Runnels, 554 F.3d 807, 815 (9th Cir. 2009))). *But see* Brandon v. Kinter, 938 F.3d 21, 42–43 (2d Cir. 2019) (vacating part of the district court's grant of summary judgment on the basis of qualified immunity); Maye v. Klee, 915 F.3d 1076, 1087 (6th Cir. 2019) (holding reasonable prison officials would have known that their conduct violated the plaintiff's clearly established free exercise rights); Ashaheed v. Currington, 7 F.4th 1236, 1248 (10th Cir. 2021) (concluding the correctional officer's conduct, which infringed on the plaintiff's right to freely exercise his religion, violated clearly established law).

132. *See* Janny v. Gamez, 8 F.4th 883, 912 (10th Cir. 2021) (holding the plaintiff's free exercise rights were "indisputably burdened" by being forced to participate in "worship services and bible study" as a condition of release).

133. *Id.* at 911–12.

134. *Ashaheed*, 7 F.4th at 1246 (alterations in original) (quoting *Janny*, 8 F.4th at 918).

135. *See Janny*, 8 F.4th at 917–18 (stating this is not a case "where defining clearly established law with 'specificity is especially important'" (quoting Brown v. Flowers, 974 F.3d 1178, 1184 (10th Cir. 2020)) (citing Est. of Valverde *ex rel.* Padilla v. Dodge, 967 F.3d 1049, 1054 (10th Cir. 2020))). *But see Gonzalez,* 824 F. App'x at 74 ("[Appellant] points to no case from this Court or the Supreme Court clearly establishing that an inmate has a First Amendment right to wear more than one strand

Outside the correctional system, free exercise claims have failed against the qualified immunity defense for similar reasons.[136] However, courts have taken a more generalized approach to other First Amendment claims.[137] For example, while evaluating a Christian student organization's freedom of speech and association claims against university officials for alleged viewpoint discrimination, the Eighth Circuit did not need closely on-point precedent to conclude that the defendants either "turned a blind eye to decades of First Amendment jurisprudence or . . . proceeded full speed ahead knowing they were violating the law."[138] In a nearly identical case brought by another Christian student organization against the same university, one judge indicated that it was clearly established law that "granting secular but not religious exemptions from a neutral policy" violates the free exercise rights of religious organizations.[139]

Historically, federal courts have required binding case law on similar, if not identical, facts for a First Amendment violation to be clearly established. But some courts have forged a different path. While not exactly creating shockwaves, the Eighth and Tenth Circuits have created a necessary ripple that may spread.

V. TAMING THE QUALIFIED IMMUNITY TEMPEST

By its terms, § 1983 broadly encompasses "every person" acting under color of law.[140] Yet, the Court has limited its scope to every person *except* police officers.[141] Moreover, considering how § 1983's purpose was to protect minorities from oppressive government officials, including police

of religious beads . . . ."); *Terrell*, 808 F. App'x at 521 ("[I]t would not have been clear to every reasonable prison official that a two-month delay in receiving kosher meals . . . was unlawful under the circumstances." (first citing *Pearson*, 555 U.S. at 232; and then citing *Foster*, 554 F.3d at 815)).

136. *See* HIRA Educ. Servs. N. Am. v. Augustine, 991 F.3d 180, 191 (3d Cir. 2021) (explaining how, "given the high degree of specificity required to prove that a right is clearly established," the appellant's claims fail because it "has not pointed to any precedential case prohibiting legislators from speaking against the sale of state-owned property").

137. *See, e.g.*, Villarreal v. City of Laredo, 17 F.4th 532, 540 (5th Cir. 2021) (explaining how, in the context of a First Amendment claim, "[t]he doctrine of qualified immunity does not always require the plaintiff to cite binding case law involving identical facts").

138. Intervarsity Christian Fellowship/USA v. Univ. of Iowa, 5 F.4th 855, 867 (8th Cir. 2021).

139. Bus. Leaders in Christ v. Univ. of Iowa, 991 F.3d 969, 989 (8th Cir. 2021) (Kobes, J., concurring in part and dissenting in part).

140. 42 U.S.C. § 1983.

141. *Cf.* Pierson v. Ray, 386 U.S. 547, 559 (1967) (Douglas, J., dissenting) ("To most, 'every person' would mean every person, not every person *except* judges." (emphasis added)).

officers, Congress clearly intended for "every person" to mean just that.[142] Nevertheless, the Court could not resist the history and policy reasons behind the common law qualified immunity defense.[143] After all, forcing police officers to carry pocket constitutions or keep up with case law would be unnecessarily burdensome and inhibit their ability to fight crime—which often involves split-second decision-making—without hesitation.[144]

Qualified immunity covers not only police officers but governors, university presidents, National Guard members, school board members, prison officials, and superintendents of state hospitals.[145] Thus, we should ask, as Justice Thomas has, whether the logic entitling police officers to qualified immunity applies to those who often do not make split-second decisions and have ample time to learn the law.[146]

For example, a university president need not instantly decide whether to shut down a religious organization as if someone's life is hanging in the balance. She could methodically consult lawyers—or Google—to ascertain the best legal course of action. Even prison personnel have time to consider the legality of their policies before imposing them on inmates. Prohibiting inmates from eating kosher or halal is hardly akin to using excessive force to apprehend a dangerous criminal in the heat of the moment. A policy decision should not be determined by an adrenaline spike or fight-or-flight response. Rather, it should be developed through a systematic, reasoned, and informed inquiry into its legality.

142. *See id.* ("The congressional purpose seems to me to be clear. A condition of lawlessness existed in certain of the States, under which people were being denied their civil rights. Congress intended to provide a remedy for the wrongs being perpetrated.").

143. *See id.* at 555 (majority opinion) ("Under the prevailing view in this country a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved." (citing Missouri *ex rel.* Ward v. Fidelity & Deposit Co. of Md., 179 F.2d 327 (8th Cir. 1950))).

144. *Cf. id.* ("A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.").

145. Procunier v. Navarette, 434 U.S. 555, 561 (1978) (citing Scheuer v. Rhodes, 416 U.S. 232 (1974)).

146. *See* Hoggard v. Rhodes, 141 S. Ct. 2421, 2422 (2021) ("But why should university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting? We have never offered a satisfactory explanation to this question." (citing Ziglar v. Abbasi, 137 S. Ct. 1843, 1871–72 (2017) (Thomas, J., concurring in part and concurring in the judgment))).

This reasoning has motivated some from both sides of the aisle to promote qualified immunity's abolition.[147] A less drastic measure calls for a different analytical approach in cases not involving life-or-death decisions, particularly First Amendment claims, which mitigates qualified immunity's issues while acknowledging the policy reasons behind its existence. This could be accomplished by categorizing qualified immunity by the urgency of the challenged conduct.[148] Alternatively, claimants could be entitled to nominal damages in an "immunity-free determination of their constitutional claims."[149]

Finally, courts could narrow the clearly established criterion when state actors make life-or-death decisions[150] while reserving a broader, less deferential approach—like the pre-*Harlow* good faith standard—for deliberative state action. Limiting the clearly established standard to "high stakes" governmental actors makes good sense. The policy reasons for giving presidential aides qualified immunity, for example, do not apply to university officials not engaged in national security or foreign diplomacy.[151]

147. *See We Must Abolish Qualified Immunity to Prevent Further Police Harm—Especially for People in Mental Health Crises*, ACLU (Mar. 19, 2021), https://www.aclu.org/news/criminal-law-reform/we-must-abolish-qualified-immunity-to-prevent-further-police-harm-especially-for-people-in-mental-health-crises/ [https://perma.cc/QR6F-9BSS] (arguing Congress should eliminate qualified immunity entirely); Clark Neily, *The Conservative Case Against Qualified Immunity*, CATO INST.: CATO AT LIBERTY (Aug. 25, 2021, 7:19 PM), https://www.cato.org/blog/conservative-case-against-qualified-immunity [https://perma.cc/25L9-QAXH] (discussing qualified immunity's flaws through a conservative lens).

148. *See* Michael L. Wells, *Qualified Immunity After* Ziglar v. Abbasi*: The Case for a Categorical Approach*, 68 AM. U. L. REV. 379, 385–86 (2018) ("A category-by-category approach would accommodate the competing policies at work in qualified immunity cases more fully than the Court's current across-the-board rule.").

149. James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1607 (2011).

150. Reinstituting the good faith standard would strike a fair compromise for the following reason:

> By limiting the circumstances under which courts can bypass the constitutional analysis and by allowing public officials to be held responsible for bad-faith violations of constitutional rights—even in cases where the law is not clearly established—the Supreme Court could ensure that well-meaning state actors are able to perform their jobs free from the fear of financial ruin, while also ensuring that those whose rights have been callously violated can obtain the justice they deserve.

Samantha K. Harris, *Have a Little (Good) Faith: Towards a Better Balance in the Qualified Immunity Doctrine*, 93 TEMP. L. REV. 511, 531 (2021).

151. *See* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (recognizing "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority" (citing Scheuer v. Rhodes, 416 U.S. 232 (1974))). This also invites the question of whether it is right to bar lawsuits from going to trial in cases involving public

To be fair, nothing stops federal courts from moving away from the clearly established standard since it is discretionary.[152] Nevertheless, there are serious disadvantages to leaving qualified immunity to the lower courts, and it may be profitable to strike a balance between the mandate of *Saucier* and the deference of *Pearson*.[153]

However, instead of applying a narrow level of generality across the board, it may be more feasible for federal courts to interpret the clearly established standard broadly in some cases and narrowly in others, depending on whether the facts warrant it.[154] This approach could be squared with existing case law, as the Supreme Court derived its "small but tactically important glosses" on the clearly established standard[155] from Fourth and Fifth Amendment cases, where each fact is distinctly significant.[156]

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officials. *See id.* at 808 ("Moreover, the Court recognized in *Scheuer* that damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity . . . ." (omission in original) (quoting Butz v. Economou, 438 U.S. 478, 507–08 (1978))).

152. Pearson v. Callahan, 555 U.S. 223, 234, 236 (2009).

153. *See* Harris, *supra* note 150, at 529 (arguing the first action the Supreme Court must take before reforming qualified immunity is "to find a middle ground between *Saucier* and *Pearson*"); *see also* Colin Rolfs, Comment, *Qualified Immunity After* Pearson v. Callahan, 59 UCLA L. REV. 468, 502 (2011) ("Without sufficient articulation, law can never become clearly established, and officials can repeatedly violate rights and claim qualified immunity."); Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 23–27 (2015) (discussing post-*Pearson* concerns, including the potential stagnation of constitutional law, the reluctancy of judges to decide qualified immunity issues, and the failure to provide lower courts with adequate guidance).

154. Despite the case before it being a Fourth Amendment challenge, the Court prescribed the specificity standard for all cases in which the clearly established inquiry is performed. *See* City of Escondido v. Emmons, 139 S. Ct. 500, 503 (2019) (per curiam) (explaining "the clearly established right must be defined with specificity," which is "particularly important in excessive force cases").

155. Wells, *supra* note 148, at 397.

156. *See* Ashcroft v. al-Kidd, 563 U.S. 731, 733 (2011) ("We decide whether a former Attorney General enjoys immunity from suit for allegedly authorizing federal prosecutors to obtain valid material-witness warrants for detention of terrorism suspects whom they would otherwise lack probable cause to arrest."); Reichle v. Howards, 566 U.S. 658, 662 (2012) (involving an allegation that Secret Service agents illegally arrested and searched without probable cause); Mullenix v. Luna, 577 U.S. 7, 10 (2015) (per curiam) (examining respondents' allegation that an officer used excessive force); Kisela v. Hughes, 138 S. Ct. 1148, 1151 (2018) (per curiam) (addressing an allegation that an officer violated the Fourth Amendment); White v. Pauly, 137 S. Ct. 548, 549 (2017) (per curiam) ("This case addresses the situation of an officer who . . . shoots and kills an armed occupant of the house without first giving a warning."); *Emmons*, 139 S. Ct. at 501 (assessing "whether two police officers violated clearly established law when they forcibly apprehended a man").

For example, as illustrated above, clearly established law must put the constitutional question "beyond debate"[157] and lead reasonable officers to understand that their conduct is unconstitutional.[158] But redrawing these lines in the First Amendment context would not necessarily abrogate those already drawn for the Fourth or Fifth Amendments. Thus, lower courts may forego assessing claims by such a stringent standard in the First Amendment context.[159] Courts may also decide that it *should* "define clearly established law at a high level of generality"[160] or that the clearly established law *need not be* "defined with specificity."[161]

Applying precedent at a narrow level of generality may be appropriate when navigating foggy facts, such as when a police officer violates an individual's rights in the heat of the moment. Yet, this fog dissipates when the decision is made from a desk or conference room.[162] Applied in the free exercise context, state actors violate a clearly established right if their action is not neutral or generally applicable, as *Smith* prescribes. This contrasts with excessive force cases, which require precedent that "squarely governs."[163]

One way a federal court could analyze or interpret a broadened, clearly established standard is to use the principles of stare decisis. If the Supreme Court has upheld a previous decision, it is clearly established under that phrase's usual and ordinary meaning.[164] Moreover, if stare decisis puts the public on notice, surely state actors are placed on the same notice, especially

157. *Mullenix*, 577 U.S. at 19 (quoting *al-Kidd*, 563 U.S. at 741) (internal quotation marks omitted).

158. *Kisela*, 138 S. Ct. at 1153 (quoting Plumhoff v. Rickard, 572 U.S. 765, 778–79 (2014)) (internal quotation mark omitted).

159. *Cf. al-Kidd*, 563 U.S. at 741 ("We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." (first citing Anderson v. Creighton, 483 U.S. 635, 640 (1987); and then citing Malley v. Briggs, 475 U.S. 335, 341 (1986))).

160. *Contra Mullenix*, 577 U.S. at 19 (quoting *al-Kidd*, 563 U.S. at 742) (internal quotation mark omitted).

161. *Contra Emmons*, 139 S. Ct. at 503.

162. *See* Priester v. City of Riviera Beach, 208 F.3d 919, 926 (11th Cir. 2000) ("To come within the narrow exception, a plaintiff must show that the official's conduct 'was so far beyond the *hazy* border between excessive and acceptable force that [the official] had to know he was violating the Constitution even without caselaw on point.'" (alteration in original) (emphasis added) (quoting Smith v. Mattox, 127 F.3d 1416, 1419 (11th Cir. 1997))).

163. Brosseau v. Haugen, 543 U.S. 194, 201 (2004) (per curiam).

164. "Clear" means to be "[f]ree from doubt" and "[u]nambiguous." *Clear*, BLACK'S LAW DICTIONARY (11th. ed. 2019). "Established" means "[h]aving existed for a long period" or "already in long-term use" and "[k]nown to do a particular job well because of long experience with good results." *Established*, BLACK'S LAW DICTIONARY (11th. ed. 2019).

considering their higher level of sophistication. Also, courts may gauge a precedent's clarity by using the same factors the Supreme Court uses to determine whether a precedent should be overruled, such as "the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision."[165] Thus, if a rule determining whether a constitutional violation exists is workable and relied upon by the public, it is clearly established. And if the rule is poorly reasoned and applied, it is not clearly established. If anything, this would add teeth to stare decisis, which some argue is merely a rhetorical tool wielded by the Court.[166]

Based on the foregoing reasoning, there is a growing movement in the federal judiciary to broaden the clearly established criterion for First Amendment claims.[167] But to accomplish a change in the law that benefits society, this movement must be nurtured, not stifled. However, any positive activity on qualified immunity would be rendered pointless if an established constitutional right loses its clarity. For the change to mean anything, then, precedent protecting rights, albeit imperfectly, must be preserved and fortified.

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165. Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2478–79 (2018).

166. As Professor Frederick Schauer opined:

> [S]tare decisis will serve almost entirely as a rhetorical weapon against opponents of what the wielder of the weapon believes to be the right result, questions of stare decisis aside. Stare decisis will continue not to constrain, and accusations of failure to adhere to stare decisis will continue to be part of the rhetorical arsenal of those who agree with a past decision and lament its overturning. So it has been in the past, and so it is likely to continue in the future.

Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 143.

167. *See* Janny v. Gamez, 8 F.4th 883, 918 (10th Cir. 2021) (stating this was not a case "where defining clearly established law with 'specificity is especially important,'" but instead one "where 'a general rule will result in law that is not extremely abstract or imprecise under the facts . . . , but rather is relatively straightforward and not difficult to apply'" (omission in original) (quoting Brown v. Flowers, 974 F.3d 1178, 1184 (10th Cir. 2020)) (citing Est. of Valverde *ex rel.* Padilla v. Dodge, 967 F.3d 1049, 1054 (10th Cir. 2020))); Villarreal v. City of Laredo, 17 F.4th 532, 540 (5th Cir. 2021) (explaining how, in a First Amendment claim, "[t]he doctrine of qualified immunity does not always require the plaintiff to cite binding case law involving identical facts"); *cf.* Intervarsity Christian Fellowship/USA v. Univ. of Iowa, 5 F.4th 855, 867 (8th Cir. 2021) ("[W]hy should university officers, who have time to make calculated about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting?" (quoting Hoggard v. Rhodes, 141 S. Ct. 2421, 2422 (2021)) (internal quotation marks omitted)).

VI. INSPECTING THE INTEGRITY OF FREE EXERCISE JURISPRUDENCE

Smith's flaws have not gone unnoticed. For one, it is counter to the text of the Free Exercise Clause, which uses broad terms without qualification, much like § 1983.[168] Nevertheless, as in *Pierson*, the Court seized the opportunity to read history and tradition into broad language by balancing religious beliefs and societal duties.[169] This idea has a clear rationale, given the subjectivity and vastness of religious beliefs and the uncertainty surrounding their sincerity.[170] As the Court stated in *Smith*:

> If the "compelling interest" test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if "compelling interest" really means what it says (and watering it down here would subvert its rigor in other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.[171]

Simply put: in a limitless strict scrutiny regime, few laws can be valid.[172] Some support for this idea lies in early state constitutions, which typically

168. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."); Emp. Div. v. Smith, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring in the judgment) ("The First Amendment, however, does not distinguish between laws that are generally applicable and laws that target particular religious practices."); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021) (Barrett, J., concurring) ("As a matter of text and structure, it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination.").

169. *See Smith*, 494 U.S. at 878 ("Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." (quoting Reynolds v. United States, 98 U.S. 145, 166–67 (1878)) (internal quotation marks omitted)).

170. *See* Braunfeld v. Brown, 366 U.S. 599, 606 (1961) ("But we are a cosmopolitan nation made up of people of almost every conceivable religious preference. . . . Consequently, it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others . . . .").

171. *Smith*, 494 U.S. at 888 (citation omitted) (quoting *Braunfeld*, 366 U.S. at 606).

172. *See id.* ("[M]any laws will not meet the test.").

extended religious liberty to citizens if their conduct did not endanger public peace or safety.[173] There is also the Virginia Statute for Religious Freedom, a precursor to the Free Exercise Clause, authored by Thomas Jefferson in 1776, which greatly restricted governmental interference with religion while declaring "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order."[174] It is likely, however, that "public peace or safety" or "peace and order" were initially intended to be narrower than *Smith* suggests.[175] After all, under this approach, public interest and religious liberty may be reconciled at the ballot box, a process that would benefit the religious majority but hurt the religious minority, a segment of the population the Founders aimed to protect.[176] At any rate, although useful, ascertaining the Founders' intent through historical analysis is highly speculative, void of objectivity, and contradictory, and it should not be the only consideration when evaluating *Smith*'s weaknesses.[177]

In his concurrence in *Fulton*, Justice Alito gave strictly hypothetical examples of *Smith*'s "startling consequences," such as how courts could impose a generally applicable rule prohibiting attorneys from adorning headwear in court, which would exclude Orthodox Jewish men, Sikh men, and Muslim women.[178] Thus, religious freedom's kryptonite is a generally applicable law that neither contains exemptions nor targets religion. While

173. *Fulton*, 141 S. Ct. at 1901 (Alito, J., concurring in the judgment). For a discussion on the importance of the early state provisos in interpreting the Free Exercise Clause, see Branton J. Nestor, *The Original Meaning and Significance of Early State Provisos to the Free Exercise of Religion*, 42 HARV. J.L. & PUB. POL'Y 971, 1023 (2019) ("[T]he state free exercise provisos do not support *Smith*'s holding that the Free Exercise [Clause] provides no protection for religiously motivated conduct against neutral laws of general applicability.").

174. *Reynolds*, 98 U.S. at 163–64 (internal quotation marks omitted).

175. *See Fulton*, 141 S. Ct. at 1903 (Alito, J., concurring in the judgment) (discussing the "unnaturally broad interpretation" the *Smith* majority gave to "public peace and safety" (internal quotation marks omitted)).

176. *See Smith*, 494 U.S. at 902 (O'Connor, J., concurring in the judgment) ("In my view, however, the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility."); *see also* Philip C. Aka, *The Supreme Court and the Challenge of Protecting Minority Religions in the United States: Review of Garrett Epps, To An Unknown God: Religious Freedom on Trial*, 9 SCHOLAR: ST. MARY'S L. REV. ON RACE & SOC. JUST. 343, 396–401 (2007) (discussing *Smith*'s "insensitivity to minority religions").

177. *See* Mark David Hall, *Jeffersonian Walls and Madisonian Lines: The Supreme Court's Use of History in Religion Clause Cases*, 85 OR. L. REV. 563, 604–05 (2006) (discussing how justices "do not necessarily appeal to the same history," how "there is no such thing as historical objectivity," and how "relying on the views of Jefferson and Madison to represent the Founders' intent is bad history").

178. *Fulton*, 141 S. Ct. at 1883–84 (Alito, J., concurring in the judgment).

one may presume most laws would fit this description, some law-making bodies have found ways to snatch defeat from the jaws of victory.

For example, the Colorado Civil Rights Commission killed its case by evincing public hostility against a religious cake shop owner who declined to procure wedding cakes for a gay couple.[179] Similarly, New York imposed COVID-19 restrictions prohibiting synagogues and churches from having more than twenty-five congregants while allowing "non-essential" businesses to make up their own rules.[180] And in *Fulton*, the City of Philadelphia excluded a Catholic adoption agency from its system of individualized exemptions because the agency refused to certify homosexual couples as adoptive parents.[181] This recent series of victories indicate that the standards for neutrality and general applicability may not be as squishy as they are in theory. Yet the fact that these wins came from shoddy regulatory construction and careless misconduct does not inspire much confidence in the religious person.

It also appears that *Smith* is irreconcilable with other precedents, such as *Sherbert* and *Yoder*. According to some, the *Sherbert* test, which applies strict scrutiny to laws violating the Free Exercise Clause, was relegated to the dark catacombs of unemployment benefits, cases involving individualized exemptions, and "hybrid rights" cases, never to be heard from again.[182] Nevertheless, the Court often finds reasons to apply strict scrutiny, especially since most laws and regulations have some system of individualized exemptions.[183] Moreover, free exercise claims are often coupled with free speech or freedom of association since speaking, expressing, and congregating are fundamentally important to most

179. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1729 (2018) (explaining how the Commission's "treatment of [the petitioner's] case [had] some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated [the petitioner's] objection").

180. *See* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66–67 (2020) (per curiam) (discussing why the State's COVID-19 policy was not generally applicable or neutral).

181. *See Fulton*, 141 S. Ct. at 1878 ("No matter the level of deference we extend to the City, the inclusion of a formal system of entirely discretionary exceptions in section 3.21 renders the contractual non-discrimination requirement not generally applicable.").

182. *Id.* at 1892 (Alito, J., concurring in the judgment) (citing Emp. Div. v. Smith, 494 U.S. 872, 881–84 (1990)); ARIENS, *supra* note 70, at 890–91.

183. *See* Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of* Smith, Sherbert, *Hogwarts, and Religious Liberty*, 83 NEB. L. REV. 1178, 1188 (2005) ("Wherever there are rules in government schools and bureaucracies, there is almost always a process for seeking discretionary waiver of (or exemption from) those rules.").

religions.[184] However, this absurd result may just be more evidence of *Smith*'s illogic.[185]

Despite the problems with *Smith*, it is unclear how they should be addressed.[186] Justices Alito, Gorsuch, and Thomas wish to overturn *Smith* and revert to the *Sherbert* era of global strict scrutiny.[187] In theory, *Sherbert* is more favorable to religious liberty than *Smith*, but what about in practice? Fortunately, the RLUIPA, which codified *Sherbert*, provides an estimation of what would happen.[188] If it were not for ambiguity in the damages portion of the RLUIPA, it may be safe to say that free exercise claims would have a greater chance of success.[189] Yet there may be other issues under this regime.

For example, in the inmate cases discussed above,[190] courts have tacked on precedent that holds a prison regulation "is valid if it is reasonably related to legitimate penological interests."[191] Because of this additional obstacle—resembling rational basis review[192]—the strict scrutiny mandated by the RLUIPA becomes obsolete. Thus, nothing prevents the creation of new

184. *See Fulton*, 141 S. Ct. at 1915 (Alito, J., concurring in the judgment) ("A great many claims for religious exemptions can easily be understood as hybrid free-exercise/free-speech claims.").

185. *See id.* (explaining how the hybrid-rights exception "would largely swallow up *Smith*'s general rule"). *But see* Margaret Smiley Chavez, Comment, *Employing* Smith *to Prevent a Constitutional Right to Discriminate Based on Faith: Why the Supreme Court Should Affirm the Third Circuit in* Fulton v. City of Philadelphia, 70 AM. U. L. REV. 1165, 1210 (2021) ("While the confusion surrounding the individualized exemptions and the hybrid rights exceptions requires clarification from the Court, no other confusion exists that would require the Court to revisit and possibly overturn *Smith*.").

186. *See Fulton*, 141 S. Ct. at 1882 (Barrett, J., concurring) ("Yet what should replace *Smith*?").

187. *See id.* at 1924 (Alito, J., concurring in the judgment) ("The answer that comes most readily to mind is the standard that *Smith* replaced: A law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest.").

188. *See* Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, §§ 2–3, 114 Stat. 803, 803–04 (stating a substantially burdensome rule is prohibited unless it "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest").

189. *See Fulton*, 141 S. Ct. at 1883 (Barrett, J., concurring) ("But I am skeptical about swapping *Smith*'s categorical . . . approach for an equally categorical . . . regime, particularly when this Court's resolution of conflicts between generally applicable laws and other First Amendment rights . . . has been much more nuanced. There would be a number of issues to work through if *Smith* were overruled.").

190. *See supra* Part IV (discussing free exercise claims commonly brought under § 1983 and the RLUIPA).

191. Turner v. Safley, 482 U.S. 78, 89 (1987); *see also* Beard v. Banks, 548 U.S. 521, 528–29 (2006) (quoting *Turner*, 482 U.S. at 87) (upholding *Turner*'s precedent).

192. *See* Heller v. Doe, 509 U.S. 312, 320 (1993) (explaining a government classification, in the context of the Equal Protection Clause, survives rational basis scrutiny if "there is a *rational relationship* between the disparity of treatment and some *legitimate governmental purpose*" (emphasis added)).

precedent that would hamper the application of strict scrutiny. Additionally, if *Sherbert* becomes the new standard for free exercise jurisprudence, its own legitimacy might be questioned, considering it functionally overruled *Braunfeld*.[193]

In her *Fulton* concurrence, Justice Barrett referenced the *Braunfeld* problem as an issue the Court may have to navigate if it overruled *Smith*.[194] Similarly, *Yoder* would need to be reconciled with *Sherbert*, likely producing more confusion than clarity.[195] Thus, one cannot be sure that *Sherbert* would adequately fill the vacuum left by *Smith*. Moreover, like with Houses Lancaster and York,[196] a war between the free exercise regimes vying for the doctrinal throne would lead to uncertainty, thereby fracturing the foundation of American liberty.

VII. THE QUALIFIED IMMUNITY CASE FOR KEEPING *SMITH*

Now we are faced with a conundrum: which doctrine should be addressed first, free exercise or qualified immunity? On one hand, the free exercise doctrine is certainly not optimal for religious people but has no viable solution. On the other, the qualified immunity doctrine is not optimal for *anyone* but has multiple clear and legitimate solutions. Therefore, the case for keeping *Smith* is this: overruling *Smith* would be detrimental to free exercise claims facing qualified immunity defenses, whereas keeping *Smith* would give free exercise claims a greater chance of success against a gradually improving, clearly established standard.

193. Sherbert v. Verner, 374 U.S. 398, 421 (1963) (Harlan, J., dissenting).

194. *See Fulton*, 141 S. Ct. at 1883 (Barrett, J., concurring) ("Should there be a distinction between indirect and direct burdens on religious exercise?" (citing Braunfeld v. Brown, 366 U.S. 599, 606–07 (1961))).

195. The confusion stems from the Court's inconsistency with how it applied *Yoder*, which has been articulated as follows:

> *Yoder* is sometimes characterized as establishing that free exercise and parenting rights receive robust constitutional protection. But an examination of the reasoning and holding of the case suggests that it sends contradictory messages about the strength of those rights. Sometimes, the Court speaks in glowing terms about these very important rights and at other times suggests that the state can override these rights relatively easily.

Strasser, *supra* note 56, at 1356.

196. Houses Lancaster and York fought a civil war in fifteenth-century feudal England over their competing claims to the English throne based on their descendance from King Edward III. *Wars of the Roses*, ENCYC. BRITANNICA, https://www.britannica.com/event/Wars-of-the-Roses [https://perma.cc/P3J5-CUB7].

This new and improved qualified immunity doctrine will likely be a broadened, clearly established standard, giving less deference to government actors in cases involving the First Amendment. Some federal courts have already demonstrated a willingness to adopt this approach.[197] Therefore, *Smith* may soon satisfy the clearly established standard in many jurisdictions, allowing more free exercise claims to prevail. This does not mean that *Smith* should be given immortality. If the clearly established standard becomes broad enough to include *newly* established precedent, *Smith*, as rife with problems as it is, can be replaced with a better doctrine.[198]

But, if *Smith* is overruled today, the resulting vacuum will suck any established clarity from the conversation. Moreover, overruling *Smith* now is like pressing a button for an elevator, waiting for it, then opting for the stairwell just before it arrives. In other words, the Court should seriously ponder how much delay in gratification it is willing to handle. Consider the Stanford Marshmallow experiments, where children were allowed to eat one marshmallow or wait to receive two.[199] The children who opted for the two marshmallows showed signs of higher intelligence based on their greater ability to handle delayed gratification.[200] Here, advocates for religious freedom face a similar choice: get one better doctrine now or have two later.

VIII. CONCLUSION

It is unclear when we will finally get both marshmallows, and the Court does not appear willing to address this issue anytime soon. Recently, the Court heard a case involving a death row inmate prohibited from receiving prayer during his execution.[201] The condemned inmate claimed a violation of his free exercise rights under § 1983 and the RLUIPA.[202] However, the Court only addressed his RLUIPA claim, omitting his § 1983 claim from

197. *See* sources cited *supra* note 167 (giving examples of a more lenient approach in First Amendment cases).

198. *See* discussion *supra* Part IV (addressing *Smith*'s problems, particularly when it clashes with the current qualified immunity jurisprudence).

199. Angel E. Navidad, *Marshmallow Test Experiment and Delayed Gratification*, SIMPLY PSYCH. (Nov. 27, 2020), https://www.simplypsychology.org/marshmallow-test.html [https://perma.cc/N92T-KH57].

200. *Id.*

201. Ramirez v. Collier, 142 S. Ct. 1264, 1274 (2021).

202. Ramirez v. Collier, 10 F.4th 561, 561 (5th Cir. 2021) (per curiam).

consideration.[203] Accordingly, whether the Court will take the opportunity to consider § 1983 free exercise claims—or how such claims must be presented to warrant the Court's consideration—remains to be seen.[204] Members of Congress could also return to the table to negotiate a qualified immunity reformation, but previous efforts have only yielded impasse.[205]

The federal judiciary's zeal towards religious liberty and lethargy toward qualified immunity indicates it does not understand the breadth of the problem. Qualified immunity affects all Americans, not just the religious. But, like Reverend Robert Pierson that day at the bus stop, the religious are particularly vulnerable.[206] The tribalistic method of thinking, which leads communities to look after their own before considering others, flies in the face of American ideals and pragmatism. If religious advocates looked beyond their own persecution, they would see the suffering of others, non-brethren and brethren alike, at the hands of unaccountable government actors.[207]

If addressing the persecution of the whole addresses the persecution of the part, why not prioritize the whole? Put another way, if standing for your neighbors would also mean standing for your friends, why not stand for your neighbors from the start? Thomas Paine went even further than

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203. *Ramirez*, 142 S. Ct. at 1272. The Court ultimately held that Ramirez "[was] likely to prevail on the merits of his RLUIPA claims, and that other preliminary injunction factors justif[ied] relief." *Id.* at 1284.

204. It certainly appears that, for the Court to address the issues presented in this Comment, the case must contain not only a claim of a free exercise violation under § 1983, which *Ramirez* lacked, but also a qualified immunity defense, which must be raised by a government actor. For example, in *Kennedy v. Bremerton School District*, a high school football coach claimed a § 1983 violation because he was prohibited from praying at the fifty yard-line. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2415–16 (2022). The Court, however, did not address qualified immunity at all. This may be because the school district never raised the defense but instead claimed it was attempting to comply with the Establishment Clause. *See id.* at 2419 (recalling the district court's denial of Kennedy's motion for a preliminary injunction because it agreed that the district "might have violated the Constitution's Establishment Clause" if it "had not suspended him").

205. Juana Summers, *Congressional Negotiators Have Failed to Reach a Deal on Police Reform*, NPR, https://www.npr.org/2021/09/22/1039718450/congressional-negotiators-have-failed-to-reach-a-deal-on-police-reform [https://perma.cc/5ZNW-RKSL].

206. Basse, *supra* note 103.

207. There is literature indicating that qualified immunity is often "not functioning as assumed" and "not achieving its intended goals" and, therefore, not as dangerous or tempestuous as this Comment suggests. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 76 (2017). The data used to reach this conclusion, however, was taken from dockets spanning only two years from five district courts. *Id.* at 19. And the cases only included those brought by civilians against law enforcement officers—not First Amendment claims against deliberate government action—which this Comment primarily discusses. *Id.* at 22.

neighbors when he stated, "He that would make his own liberty secure, must guard even his *enemy* from oppression; for if he violates this duty, he establishes a precedent that will reach to himself."[208] Dr. King may have articulated this principle best when he argued that "injustice anywhere is a threat to justice everywhere."[209]

Therefore, promoters and protectors of the Constitution must avoid distractions, like the appeal of a particular renovation in the face of larger destruction. We must do something about the qualified immunity storm before scrapping the religious liberty foundation cemented by *Smith*. The house of American freedom, without a stable foundation, is built on sand. And when the storm beats on it, it will surely fall, and "great [shall be] the fall of it."[210]

208. THOMAS PAINE, DISSERTATION OF FIRST-PRINCIPLES OF GOVERNMENT 32 (1795).

209. THE YALE BOOK OF QUOTATIONS, *supra* note 7, at 427.

210. This Comment's "house built on sand" metaphor comes from a part of Jesus Christ's Sermon on the Mount; the full quotation is as follows:

> And every one that heareth these sayings of mine, and doeth them not, shall be likened unto a foolish man, which built his house upon the sand: And the rain descended, and the floods came, and the winds blew, and beat upon that house; and it fell: and great was the fall of it.

Matthew 7:26–27 (King James).